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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF APPELLANTS

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BRIEF AMICUS CURIAE OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION IN SUPPORT OF APPELLANTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The California Cable Television Association ("CCTA") submits this brief as *amicus curiae* in support of appellants.[1]

CCTA is a trade association representing cable television system operators that provide cable television service to over five million California residents. CCTA brings information to the Court concerning the extent of First Amendment activities engaged in by cable television

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[1] Consistent with S. Ct. R. 37.3, all parties have given CCTA their consent to the filing of this brief.

operators and the impact of the must carry law on cable television systems in California. This *amicus* brief will illustrate that resolution of the issues before this Court in this case will affect the ability of California cable television operators and other cable television operators to engage in conduct protected by the First Amendment.

CCTA is a central clearinghouse for information on programming provided by its member cable television operators, much of it relating to the core concern of the First Amendment. This programming is threatened by the must carry provisions [2] of the Cable Television Consumer Protection and Competition Act of 1992 ("The 1992 Cable Act").[3] In addressing the issues before it, the Court should give substantial weight to the robust expressive activity that is undertaken by the cable television medium in California.

Since 1958, CCTA has participated in proceedings before a wide range of administrative, legislative, and judicial bodies on behalf of the cable television industry in California and its individual members. CCTA has a wide range of experience advocating the First Amendment rights of cable television operators before this Court [4] and before the Ninth Circuit Court of Appeals.[5] Most recently and most in point, CCTA filed *amicus* briefs when certain of its individual cable television system members sought to enjoin enforcement of the must carry

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[2] 47 U.S.C. § 534 and 535.

[3] Pub. L. No. 102-385, 106 Stat. 1460.

[4] See *amicus* brief filed by CCTA in *Leathers v. Medlock*, 499 U.S. ——, 111 S. Ct. 1438 (1991).

[5] CCTA filed *amicus* briefs in *Preferred Communications, Inc. v. City of Los Angeles California, and Department of Water and Power*, 754 F.2d 1396 (1985); and *Preferred Communications, Inc. v. City of Los Angeles, California, and Department of Water and Power*, Nos. 91-55625, 91-55665, argued on June 8, 1993.

provisions of the Cable Act in pending cases in the Northern [6] and Central [7] Districts of California.

SUMMARY OF ARGUMENT

This case presents the fundamental question of whether government can exercise control over, and restrain the rights of, cable television operators who are important sources of news, information and entertainment to their subscribers, to promote the relative power of the voices of a competing class of speakers—local broadcast television stations—based upon a congressional perception that the broadcast industry is in economic decline.

In this brief CCTA argues that, based upon the facts presented below as to the First Amendment protected activities of cable television operators, this Court should hold the mandates of the must carry restrictions unconstitutional. As active and robust First Amendment speakers, cable television operators are entitled to the highest degree of First Amendment protection.

ARGUMENT

I. THE MUST CARRY RULES IMPINGE UPON THE CURRENTLY ROBUST EXERCISE OF EDITORIAL DISCRETION BY CABLE TELEVISION OPERATORS

While the Supreme Court has not yet delineated the precise limits of the First Amendment protections extended to cable television, it has observed that cable television operators exercise "a significant amount of editorial discretion regarding what their programming will include." [8] In 1991 the Court stated:

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[6] *Viacom International, Inc. v. FCC*, No. C-93-1984 EFL (N.D. Cal.).

[7] *Community Cablevision Co. v. FCC*, No. CV 93-3104 R (C.D. Cal.).

[8] *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494, quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

> Cable television provides to its subscribers news, information, and entertainment. It is engaged in "speech" under the First Amendment, and is, in much of its operation, part of the "press." [9]

For seven years, from the 1985 D.C. Circuit decision striking down the FCC's former local broadcast signal "must carry" rules until the enactment of the 1992 Cable Act, these editorial decisions were solely those of the cable television operator.[10]

The importance of the editorial discretion exercised by cable television operators is amply illustrated in this case by the deleterious results that implementation of those provisions have had in California, and the public outcry in response.

A. Specific First Amendment Harm Has Been Suffered By California Cable Television

The must carry obligations of cable television systems located in large television markets such as those in California are particularly onerous. Two cable television operators in such California markets have challenged the must carry rules as applied to them.

In the San Francisco Bay Area the must carry rules forced Viacom International, Inc. ("Viacom") to drop several cable television programming networks from a number of its cable television systems in favor of broadcast signals.[11] Viacom requested an injunction of the must

[9] *Leathers v. Medlock*, 499 U.S. at ——, 111 S. Ct. at 1442 (1991).

[10] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988).

[11] Here, as in other contexts, a right may be valued by the consequence of its loss. The attached copy of a June 2, 1993 *San Francisco Examiner* article describes some of the public outcry over Viacom's planned channel changes as a result of must carry. *See* Appendix attached hereto.

carry provisions for its systems in the East Bay, Marin County, San Francisco, Petaluma, Pinole, and American Canyon.

At the time of implementation of the must carry rules, Viacom was forced to add four stations in the East Bay Area: Concord and San Jose stations with primarily religious formats, a San Francisco Asian language station, and a San Jose Spanish language station. To make room for those broadcast station additions, Viacom was forced to delete three non-broadcast channels it had been carrying: a channel that provided local religious programming, a channel that carried CNBC business news as well as the Comedy Central, and a channel called Sneak Preview, which promoted Viacom's pay-per-view programming.

In Marin County, Viacom was forced to add three stations: a San Francisco Asian language station, a San Jose Spanish language station, and a non-commercial San Mateo station mixing PBS and instructional programming. To make room for these additions, Viacom was forced to drop Bravo, which is a cultural arts cable television network, the evening programming of C-SPAN I, portions of a preview guide service, and a PBS station from San Jose that did not have must carry rights.

In San Francisco, Viacom had to add three stations: Concord and San Jose stations with primarily religious formats and a San Mateo non-commercial station offering a mix of PBS and instructional programming. To make room for these additions, Viacom was forced to limit C-SPAN I solely to live coverage of the U.S. House of Representatives, eliminating all its other public affairs programming, and pair it with the Playboy Channel, move the American Disabilities Channel and pair it with Bravo (which resulted in reduction of Bravo programming from full to part time), and delete portions of Sneak Preview programming and one-and-one-half pay-per-view channels.

This June, in granting the initial request by Viacom for a temporary restraining order and enjoining the FCC and the United States from implementing or enforcing the must carry provisions against Viacom, Federal District Judge Eugene Lynch recognized that the must carry rules interfere with cable television operators' editorial discretion and elevate the speech of local broadcast stations over cable television speakers. This statutory scheme implicates constitutional issues that rest at the heart of the First Amendment.[12]

The must carry rules have had an equally invasive effect on the First Amendment rights of Community Cablevision Company, doing business as Dimension Cable Services ("Dimension"), in Orange County in Southern California.[13] The Los Angeles Area of Dominant Influence ("ADI") contains 21 commercial broadcast stations and five non-commercial educational stations.[14] Systems such as Dimension, with 38 channels just barely over the 37-channel threshold that the 1992 Cable Act sets for requiring carriage of *all* nonduplicative noncommercial stations that request carriage,[15] have been particularly inhibited by the must carry rules. The rules required Dimension not only to carry *five* non-commercial television stations, but also to set aside 13 channels for the carriage of qualified commercial stations. The total number of

[12] *See* Temporary Restraining Order issued by Judge Lynch, dated June 1, 1993 in *Viacom International Inc. v. FCC*, No. C-93-1984 EFL (N.D. Cal.) at 4 ("[i]t is beyond all doubt [that Viacom's claims] raise serious First Amendment questions"); *see also* at 6 ("there is simply no denying that Viacom's suit raises serious First Amendment questions"). This case was eventually decided on *res judicata* grounds. *See* Order, August 26, 1993.

[13] *See Id.*, Memorandum of Points and Authorities in Support of Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction, filed on May 28, 1993.

[14] 1992 *Broadcasting Yearbook*.

[15] 47 U.S.C. § 615(b)(1).

stations Dimension was thus required to carry is 18, or nearly 50 percent of its channel capacity, before Dimension had the opportunity to exercise any editorial discretion to decide how best to serve the needs and desires of its subscribers.

In its attempt to overthrow the must carry rules as applied to Dimension Cable, Dimension alleged that the must carry provisions required it to carry four additional commercial broadcast stations which it did not wish to carry. The must carry provisions also required that Dimension provide full-time carriage to one other commercial broadcaster that it currently carried on a part-time basis. Dimension's entire channel capacity was already being used for other programming services desired by its customers; thus, the must carry provision forced Dimension to reduce to a part-time basis its carriage of its own locally originated programming, C-SPAN, VH-1 and the Weather Channel and required it to displace The Movie Channel and Continuous Hits I, a pay-per-view service, from its channel lineup.[16]

Dimension, Viacom, and other similarly situated major market California cable television operators are deprived of even more than one-half of their capacity by governmental fiat when their leased access, public, educational, and governmental access and must carry requirements are aggregated. Far from being a precisely balanced legislative approach to a perceived problem, as applied to cable television operators in major California markets, the must carry rules sweep far too broadly. They inhibit cable television operators from exercising editorial discretion over their channel lineups consistent with their

[16] The Central District in the *Dimension Cable* case, like the Northern District in the *Viacom* case, never reached the First Amendment issues since the motion for preliminary injunction here was also denied on the basis of *res judicata*. *Community Cablevision Co. v. FCC*, No. CV 93-3104 R (C.D. Cal.), September 23, 1993.

own status as First Amendment-protected speakers. The must carry rules also shut out many other diverse speakers—cable television programming networks and local origination producers—who would otherwise gain access to these channels of communication.

B. Other California Cable Television Operators Make Editorial Programming Selections That Are Inhibited By the Must Carry Rules

Absent the must carry provisions challenged here, other California cable television system operators also make editorial choices among a wide variety of broadcast signals and satellite-delivered networks designed specifically for cable television system use. They select local broadcast signals, choosing among the three major network affiliates, Fox affiliates and other commercial independents, and public television stations in the local area, which in most California television markets comprise over a dozen broadcasters in total. California cable television operators also decide whether to import broadcast signals that cannot be received over the air with an ordinary home antenna. These signals, such as "superstations" WTBS, Atlanta, or WGN, Chicago, are brought into the cable television operator's service area either by microwave or by satellite.

California cable television operators also select from among more than 100 satellite program networks created specifically for the cable television industry. Nearly all of the over five million California cable television subscribers have access to twenty-four hour news from CNN and coverage of the United States Senate and House of Representatives from C-SPAN as part of their basic programming.

A cable television system operator's selection of programming involves a classic editorial function protected by the First Amendment. The fact that the expression may in some cases be originated by another party does

not remove the First Amendment protection that these editorial decisions usually enjoy. The *Los Angeles Times* or *San Francisco Chronicle* is not entitled to less First Amendment protection when it publishes an article as reported by the Associated Press or the opinion of a syndicated columnist. A broadcaster is not less protected when it selects network or syndicated programming.[17] Nor is a book or magazine seller entitled to any less protection in deciding what publications to stock and how to display them. Seldom do two cable television systems in California select precisely the same programs to offer to the public. And, even if they did, it would be irrelevant to a First Amendment analysis of their speech rights.

C. The Must Carry Rules Also Hamper Direct Communication Between Cable Television Operators And Their Subscribers

There are a number of state and regional networks unique to California. California cable television system operators also produce their own local programming. Much of this programming concerns public affairs. Indeed, sometimes cable television is the only source of such local information and opinion in California cities. The must carry rules thus not only create a chilling effect on highly valued programming, but also impermissively place the government in the position of handicapping competition in the marketplace of ideas.

Many California cable television operators, in conjunction with local broadcasters or newspapers, provide six minutes of local news and public affairs "Local Edition" inserts each half-hour to the national CNN Headline News cable television service. This "Local Edition" service reaches 1.4 million California cable television subscribers. In addition to these services, in some Cali-

[17] *Miller v. California*, 413 U.S. 15 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).

fornia communities, local origination programs produced by cable television operators are highly developed, with daily newscasts that rival those of local broadcasters, and with depth of coverage that goes well beyond a "Metro" section of the local newspaper. Other cable television operators present weekly public affairs cablecasts that feature interviews with local officials, community leaders and candidates for local elections. Local programs also include live and tape delay cablecasts of city council meetings and local community events, such as sporting events and parades. As Orange County continues to develop a separate identity from Los Angeles, for example, cable television local origination has become the most logical way to serve the television news needs of the community.

In almost six years, Century Cable's Los Angeles system has produced almost 500 locally-originated public affairs programs distributed on a regular basis to thirty Los Angeles area cable television companies, with wider distribution when events warranted. Century's regular "Week in Review" program features politicians, press, and pundits discussing issues of community concern. Issue specials spotlight particular questions of public concern, including issues concerning the Cable Act and its implementation. Personality profiles highlight individuals in politics, business, and entertainment. Election specials have included candidate profiles, debates, press conferences, interviews, and critiques of political commercials. Century distributed statewide the only video debate between the candidates for state treasurer to all California cable television systems.

Viacom 6, the local origination channel of Viacom of San Francisco, employs twelve persons who produce local public affairs programming and facilitate public access programming. Viacom 6 has three regular weekly half-hour shows: "Viewpoint," an interview show that features public officials; "City Desk," a live round table discussion

that features journalists discussing San Francisco news and events; and "Helping Hands," a public health show that features a particular emphasis on AIDS. Monthly shows and specials on the arts, politics, neighborhood viewpoints, and earthquake safety are also produced.

California cable television operators also carry unique regional news networks. In September 1990, a regional cable television news network, Orange County NewsChannel, began 24-hour televised local news, sports, public affairs and cultural events coverage of Orange County, California, where most over-the-air news comes from the television stations that focus on neighboring Los Angeles County.[18] NewsChannel is being operated by Freedom Newspaper Corporation, which owns the *Orange County Register*, a local newspaper, and newspaper staff are helping to write and produce the programming for this channel.

Moreover, California cable television operators run the California Channel. The California Channel transmits live and taped coverage of the California Legislature, its committees and subcommittees almost three million California cable television subscribers. In many cases, the ability of cable television operators—including those serving on the California Channel's Board of Directors—to provide this service to subscribers depends upon having channel capacity, which is depleted as a result of the must carry rules.

Finally, California cable television operators gain the ability to communicate with their subscribers by retaining rights to local advertising time on cable television networks. Much of this time is dedicated to commercial speech. However, cable television operators also use this time to advocate with their subscribers on issues affecting operators before franchise authorities, the State, and Congress. Cable television operators have used their time to

[18] NewsChannel is currently distributed to almost all of the 500,000 cable television subscribers in Orange County.

urge subscribers to contact city council members to oppose local utility user taxes. They have used this time to urge subscribers to contact legislators and the Governor to oppose statewide cable television taxes. They have used this time to urge subscribers to petition Congress in opposition to the Cable Act.

This is the most highly protected form of political speech. By limiting the ability of cable television operators to control their channel lineups, the must carry provisions inhibit cable television operators from exercising their right to communicate directly with their subscribers.

II. CABLE TELEVISION SPEAKERS ARE ENTITLED TO THE HIGHEST FIRST AMENDMENT PROTECTION COEXTENSIVE WITH THAT ACCORDED THE PRINT PRESS

Thus, California cable television operators are full-fledged electronic publishers, possessed of all the editorial prerogatives of any of the newspaper publishers with whom they may co-produce channels, and are entitled to co-extensive First Amendment protections. Because the intrusive regulatory scheme in the must carry provisions could never be upheld in the context of the print press, they must be struck down.[19]

[19] *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974); *Turner Broadcasting System, Inc. v. FCC*, 113 S. Ct. 1806, 1807, 1808 (1993) (Rehnquist, J., in chambers) ("Congress plainly could not impose the must-carry provisions on privately owned newspapers"); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453 (D.C. Cir. 1985); *cert. denied*, 476 U.S. 1169 (1986) (*"Quincy"*) ("if *Miami Herald* supplies the appropriate mode of First Amendment analysis, our inquiry would be at an end"); *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401 n.1 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986) ("[i]mposing access requirements on the press would no doubt be invalid"); *Century Federal, Inc. v. City of Palo Alto*, 710 F. Supp. 1552, 1554 (N.D. Cal. 1987) (*"Century Federal II"*) ("Clearly, if . . . access requirements were applied to the traditional press, such as newspapers, they would violate the first amendment.").

CCTA believes that this Court must declare the must carry provisions to be invalid under the prevailing principles of First Amendment law applicable to the jurisdiction, notwithstanding the divided decision of the three-judge district court below in *Turner Broadcasting System, Inc. v. FCC*.[20]

The level of First Amendment protection to be accorded cable television is a critical legal issue with far reaching ramifications not only to cable, but also to the entire communications industry, especially as the technological revolution in that industry continues to unfold. Cable television has become the electronic embodiment of the print press: an important source of news, opinion, and other information to millions of people throughout this country.[21]

The development of the newspaper industry was due in part to a historical pattern of full and robust First Amendment protection—a protection that does not tolerate any interference with the exercise of editorial discretion.[22]

[20] 819 F. Supp. 32 (D.D.C. 1993).

[21] As stated by Judge Lynch in *Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465, 1474 (N.D. Cal. 1986) (*Century Federal I*), "[i]n an age when most people receive their daily news via the television, that medium has established a role as critical to the free flow of ideas and information in this society as any of the more traditional media." *See also Leathers v. Medlock*, 111 S. Ct. at 1442 (1991) ("[c]able television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press'"). *See also City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats").

[22] *See Tornillo*, 118 U.S. at 258 (invalidating Florida statute requiring right of reply in newspapers because it impairs editorial functions).

Like the editorial functions of the print editors protected by the Supreme Court in *Tornillo*, cable television operators create, gather, package and distribute news, information and entertainment to their subscribers.[23] Given the similarities between functions exercised by the print editors and cable television operators, as well as the role of cable television as the electronic press of the modern era, cable television operators are entitled to the same First Amendment protection as that accorded the print media.

Rights of cable television operators to full First Amendment protection is not merely the product of analogizing its editorial functions with those of the print press. The starting point in any constitutional analysis of the regulation of any medium is that the particular medium at issue is entitled to the same protection as that afforded the print press. Some rationale must then justify reducing that medium's First Amendment protection. This is the analysis applied by California Federal District Judge Lynch in *Century Federal I*.[24] Confronted with the issue of whether cable television was more akin to broadcast television or the print press, Judge Lynch noted that protection less than that accorded the print press "was the exception to the rule that must be justified by a particular difference."[25] Judge Lynch went on to state: "Consequently, in developing the first amendment standard to be applied . . . the question becomes whether there are any differences in the characteristics of the CTV medium that justify a lesser standard of protection for it. . . ."[26] After considering a number of rationales submitted as justifying reduced protection for cable, Judge Lynch concluded, as a matter of law on the record before him, that

> [a]lthough the fact that cable television places a heavier burden on the public domain than more traditional forms of the media may justify some governmental regulations of that burden . . . there are [not] any other differences attributable to cable television that can justify a degree of first amendment protection similar to that applied to the broadcast medium.[27]

This case calls for an identical analysis. And, like the conclusion reached in *Century Federal I*, there is no rationale here that can justify relegating cable television to a reduced standard of First Amendment protection.

Because there is no rationale to justify reducing the First Amendment protection of cable television operators,[28] this Court must conclude that cable television is entitled to First Amendment protection coextensive with that of the print press. And, since the must carry provisions could not be applied to the print press, they must be struck down.

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[23] *See Century Federal II*, 710 F. Supp. at 1555 ("this Court believes [the function of newspaper editors] is closely analogous to the editorial functions of a CTV operator").

[24] Judge Lynch's opinion in *Century Federal I* remarked upon how the Supreme Court, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), had faced the question as to whether a lesser First Amendment standard applied to films. There the Supreme Court held that "[t]here is no justification in this case for making an exception" to the rule that "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Century Federal I*, 648 F. Supp. at 1470 citing *Burstyn*, 343 U.S. at 503.

[25] *Century Federal I*, 648 F. Supp. at 1470.

[26] *Id.*; *see also Group W. Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 961 (N.D. Cal. 1987) ("the starting point for the Court's analysis is that unless cable television differs in some material respect from the print media, the First Amendment standards that apply to newspapers apply with equal force to cable").

[27] *Century Federal I*, 648 F. Supp. at 1475.

[28] Because of the nature of the must carry provisions, CCTA cannot conceive of a manner in which any other possible justification for lower First Amendment scrutiny (*e.g.*, Economic or Physical Scarcity, Use of Public Rights of Way, Forum Analysis or Subsidy Law) might apply.

III. THE GOVERNMENT CANNOT REDRESS A PERCEPTION OF MARKET IMPERFECTION BY COMPELLING A CABLE TELEVISION OPERATOR TO ALTER ITS CABLE TELEVISION CHANNELS INCONSISTENT WITH THE MANNER IT WOULD OTHERWISE EXERCISE ITS EDITORIAL RIGHTS

The must carry provisions are not mere economic regulation subject to a deferential standard of judicial scrutiny like that applied in *Associated Press v. United States*.[29]

The majority's opinion in *Turner* turns on its finding that Congress intended "to restore competitive balance and assure a functional market in the distribution of video signals," and terming the must carry provisions as "essentially . . . economic regulation," the majority upheld the must carry provisions.[30] But *Tornillo* instructs that government cannot redress a perception of market imperfection by compelling speakers to alter the package of information that they would otherwise voluntarily disseminate.[31]

In addition, the majority's conclusion that the must carry provisions are mere "economic regulation" derives from its flawed signals with a commercial commodity

[29] 326 U.S. 1 (1945).

[30] *Turner*, 819 F. Supp. at 41.

[31] Taken to its ends, with this analysis, under the guise of redressing "monopoly" conditions, as determined solely at the exercise of its discretion, government could require newspapers to devote substantial portions of their publication to local columnists or movie theaters to run locally produced movies two days per week. The First Amendment cannot tolerate such behavior. It is a shield that protects against government, not a sword to be wielded at the government's whim. *Tornillo*, 418 U.S. at 254; *see also International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2716 (Kennedy, J. concurring).

market.[32] But the must carry provisions are not "commodity regulation" and do not regulate aspects of the video signal that cable television operators use (*e.g.*, by setting standards for signal strength or quality). Rather, these provisions force operators to carry local broadcast stations and provide that message to subscribers. Thus, these provisions are more akin to regulation that dictates to a theater owner whose movies to place inside its movie projector or that tells a newspaper owner whose columns to place inside its printing press. The *Turner* majority's effort to divorce cable's message from the medium fails, and, as the majority opinion itself acknowledges, "video signals have no other function than to convey information."[33]

In contrast to the *Turner* majority's analysis, there is a significant body of precedent that requires application of strict scrutiny to the must carry provisions.

First, the must carry provisions are content-based. They directly usurp a cable television operator's editorial discretion to select programming on a broadcaster versus broadcast and broadcasters' versus cable television programmer basis, and do so, as a result of Congress' judgment about the content of programming provided by "local" broadcast stations. As Circuit Judge Williams noted in his dissent in *Turner*, the must carry provisions provide mandatory access to a special class of speakers—local commercial and noncommercial television stations—

[32] According to the majority's opinion, the fact that cable speakers use video signals as their means of communicating "speech" is "of no particular significance" because similar arguments could be made for commodities like printing presses or movie projectors—commodities subject to regulation without impinging upon the First Amendment rights of those who use them. *Turner*, 819 F. Supp. at 40.

[33] *Id.*

chosen by Congress as a result of an explicitly content-related finding.[34]

Second, the must carry provisions compel speech by overriding a cable television operator's editorial discretion. That is constitutionally suspect under the First Amendment and requires strict scrutiny.[35]

Third, the must carry provisions subjugate the speech rights of cable television operators to their direct competitors—broadcast television—based on a perception that the speech of the latter requires governmental assistance. By so providing, Congress has contravened a core principle of the First Amendment.[36]

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[34] *Id.* at 58 (Williams, J., dissenting) (citing 47 U.S.C. § 532 (a)(11)).

[35] In dissent, Circuit Judge Williams agreed that strict scrutiny applied because the must carry provisions infringed upon cable operators' editorial discretion to select programming. *Id.* at 59. *See Riley v. National Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 795 (1988) ("[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is "content-based"). In *Riley*, the Court expressly stated that "[t]he First Amendment mandates that we presume the speakers, not the government, know best what they want to say and how to say it," 487 U.S. at 790-91, and that any statute "regulating how a speaker may speak" directly affects that speech. *Id.* at 790 n.5. *Riley* thus stands for a salient principle: government "even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers." *Id.* at 791. *See also Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 9 (1986) (plurality opinion) ("compelled access . . . both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set"); *Tornillo*, 418 U.S. at 256, 258 (intrusion upon function of editors is constitutionally impermissible). *See also Wooley v. Maynard*, 430 U.S. 705 (1977).

[36] Although Congress may not intentionally have sought to suppress the speech of cable programmers because of any disagreement with their views, but rather have sought to advance the fortunes of broadcasters and what it believed were First Amendment values, Congress has accomplished its mission only at the expense of silencing the voices of cable programmers. As recognized by the dissent in *Turner*, "[g]iven the finite number of cable channels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." *Turner*, 819 F. Supp. at 59. (footnote omitted). The result is constitutionally impermissible. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). The must carry provisions impose a burden "on one set of speakers for the direct and explicit advantage of a limited class of their competitors." *Turner*, 819 F. Supp. at 60. Legislation simply cannot establish a "pecking order" for speakers. *Id.*; *see also Pacific Gas & Elec. Co.*, 475 U.S. at 14 (speaker has First Amendment right "to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents").

Fourth, the must carry provisions aim at a narrow group of First Amendment speakers—cable television operators—and impose burdens upon them that are not generally applicable, in fact, not even applicable to other multichannel video programming distributors, such as MMDS or DBS. That is constitutionally suspect and subject to strict scrutiny.[37]

IV. THE MUST CARRY PROVISIONS ARE NOT PRECISELY DRAWN TO FURTHER ANY GOVERNMENTAL INTEREST

Since the must carry provisions trigger strict scrutiny, the government bears the heavy burden of demonstrating that these provisions serve a compelling interest and are precisely drawn to further that interest.[38] The government cannot meet its burden.

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[37] *See Leathers v. Medlock*, 111 S. Ct. at 1443-44 (strict scrutiny appropriate when government "targets a small group of speakers"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987) ("singling out the press as a whole or targeting individual members of the press—poses particular danger of abuse by the State").

Congress offers, and Government relies upon, a number of "findings" concerning a perceived threat to local broadcasting stations' competitive viability and the interest in maintaining their economic strength as justifications for a punitive regulatory regime. Several of Congress' "findings" are nothing more than wholesale adoptions of long-standing assertions by the broadcast industry.[39] In the context of the First Amendment, these "findings" must be carefully scrutinized.[40] Among the more dubious findings are:

- as a result of cable's deriving revenue from advertising, cable's purported "economic incentive to limit the voice of broadcast stations in the television market," despite the fact that the overwhelming source of cable television operators' revenue derives from subscriptions, not advertising;
- cable television subscribers' inability to receive over-the-air broadcast signals when common sense indicates such individuals could use antennae;

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[38] *See, e.g., Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

[39] *See Turner*, 819 F. Supp. at 65 (Williams, J., dissenting) ("the legislative findings simply do not support the inferences needed to sustain must-carry" and "[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open, even in the area of First Amendment rights—to exercise of the most naked interest-group preferences").

[40] *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). *See also Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 129 (1989) ("it is our task in the end to decide whether Congress has violated the Constitution. This is particularly true where the Legislature has concluded that its product does not violate the First Amendment."); *Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) ("[I]f a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce.").

- cable's purported widespread dropping or repositioning of broadcast stations.[41]

While the legitimacy of any of these findings is certainly open to question, none rise to the level of a compelling governmental interest. Moreover, if any governmental interest is at stake here, Congress could easily have furthered that interest in a less intrusive manner.[42] In the area of the First Amendment, such overbreadth is fatal.

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[41] As to this, the House Report admits that "the [House] Committee has not found that cable systems are engaging in a widespread pattern of denying carriage of local television stations." (H.R. No. 628, 102 Cong., 2d Sess. 52 (1992)). Further, the FCC admits that its 1988 FCC study from which Congress "extrapolated" its "figures" (*see* S. Rep. No. 92, 102 Cong., 1st Sess. 43 (1991)), did not "focus on or attempt to explain the factors affecting cable systems' carriage decisions." *See* MM Docket No. 89-600, FCC 90-276 at ¶ 165.

[42] For example, if the protection of local broadcast stations was a compelling governmental interest, Congress could require television manufacturers, cable operators or broadcasters themselves to supply cable subscribers with antennae, or Congress can provide direct subsidies to local broadcast television. In either case, cable's First Amendment rights would not be impaired as with must carry.

CONCLUSION

California and other cable television operators exercise editorial discretion in programming their channel lineups and speaking directly to their subscribers. Often their speech involves the highest level of protected political speech. Imposition of the must carry statutory scheme upon the speech of these cable television operators is abhorrent to their free speech rights and cannot be supported under the principles of the First Amendment and the precedents of this Court.

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APPENDIX

APPENDIX

[from the *San Francisco Examiner*, June 2, 1993]

CABLE TV CAN KEEP POPULAR PROGRAMS

Court lets Viacom ignore
'must-carry' rules—for now

By Michael Dougan
Examiner Marin Bureau

SAN RAPHAEL—A federal judge has temporarily blocked new FCC rules that would force cable TV operators to drop popular channels in favor of local stations carrying religious instruction, foreign-language movies and classroom lectures.

Under a temporary restraining order issued Tuesday by U.S. District Judge Eugene Lynch, Viacom International systems in San Francisco, Marin, Sonoma, Napa and Contra Costa counties can ignore a Wednesday deadline to follow "must carry" rules Congress imposed on the Federal Communications Commission under the Cable Consumer Protection Act of 1992.

The so-called "must carry" rules would require cable operators to broadcast the signals of local TV stations.

Because many cable operators don't have empty channels to spare, that means more distant stations would be dropped from their systems.

Lynch's restraining order delaying the new rules for 30 days, which came in response to a lawsuit by Viacom, does not apply to other cable operators in Northern California but it could set precedence for future cases.

A three-judge panel will accept written and oral arguments on the case over the next few weeks, before ruling on the case.

In Marin County, Viacom planned to eliminate KTEH-TV (Channel 54), a San Jose public TV station noted for its unusual "theme nights" and its preponderance of British programming. Viacom isn't required to carry KTEH because the station is outside its "must-carry zone."

Angry anglophiles descended on Viacom's Marin County headquarters in San Rafael Tuesday morning to picket for unbroken access to such British programs as "East Enders," a cockney soap opera, and "Rumpole of the Bailey," a comedy series, carried on KTEH.

Marin's Viacom planned to replace KTEH with KCSM (Channel 60), a San Mateo-based PBS channel that features college classroom instruction.

'The most viewer-responsive'

"The programming on KTEH is unique," said Gage Taylor, 51, of Sausalito. "They carry some programs that are unique to the country, and they're the most viewer-responsive of any PBS station."

Elana Ellis of Larkspur said about half of the demonstrators like herself, hailed from Britain.

On hand to videotape their comments was Maura Daly Phinney, a Channel 54 producer. "We have about 6,000 members in Marin," she said, "and those are just the people who actually gave us money."

Viacom also planned to drop the Bravo cultural arts premium channel and cut drastically its coverage of C-Span, which airs U.S. congressional sessions.

In San Francisco, Tuesday's ruling means Viacom won't have to juggle several channels to accommodate KCSM and KLXV (Channel 65), a Christian channel out of San Jose.

"This really is a victory for our customers," said Sue Levitin, Viacom's San Francisco spokeswoman.

In Marin, where Spanish- and Asian-language channels would have been added under the new rules, Viacom's North Bay general manager Tim Rea said the "must-carry" policy was troublesome to Bay Area cable operators.

He noted that many cable systems had limited channel capacity and that there were an unusually high number of broadcast stations that could claim "must-carry" status.

By 1995, when Marin's Viacom customers will get 54 channels on an upgraded system, meeting the rules won't be a problem, Rae said.

In Fairfield, the 25,000 subscribers to MultiVision area cable system were to lose KPIX (Channel 5), San Francisco's CBS affiliate, on Wednesday.

"According to the FCC's new rules, KPIX is located out of our area of dominant interest," said Fran Parkey, MultiVision vice president and Northern California regional manager.

Under the new setup, MultiVision will begin carrying KSCH (Channel 58), a Sacramento independent station that airs movies, cartoons and syndicated reruns—but no newscasts.

Since MultiVision carries Sacramento's CBS affiliate, said Parkey, "our subscribers will get to see the network stuff, but they'll be cut off from KPIX's local productions, San Francisco-area news coverage and personalities they've come to identify with during the last decade."

At Cable Oakland, general manager Clay Owens planned to ignore the FCC's June 2 deadline for "must-carry" compliance.

"My dilemma is that KFCB (Channel 42) in Oakland and KLXV in San Jose both want to be on our system,"

said Owens. "Both are dedicated to Christian religious broadcasting and are owned by the same company. I don't believe the FCC wants duplication, so to prevent further chaos I will stand pat until July or until such time as I get further guidance from the FCC."

Despite the court ruling, Viacom's battle is far from won, said Rae. "Between now and the end of the year a number of other actions could create other disruptions for our customers."

They include rules that allow broadcasters to insist on payment from cable companies that carry them, unless they choose to declare themselves a "must-carry" station.

"The stronger channels might decide they want to make some money off this deal," Rae said. "But if negotiations don't go well, we'll literally drop these stations."

And if an agreement comes, he said, the costs could be reflected in customers' bills.

Al Morch of The Examiner staff contributed to this report.

[Picture Omitted in Printing]